(14)

No. 91-610

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,

Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether the Petitioner welfare and pension trust funds, which have surplus reserves derived in part from contributions made on behalf of the Respondent employees, must transfer a share of those surplus reserves to the welfare and pension trust funds established by Respondents to comply with section 302(c)(5) of the Labor Management Relations Act when the Respondent employees, comprising all of the employees of the Respondent employers, transferred from coverage under the Petitioner pension and welfare funds to the pension and welfare funds established by Respondents?

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BRIEF FOR THE RESPONDENTS

PRELIMINARY STATEMENT

Respondents, the management trustees of the Local 144-Southern New York Residential Health Care Facilities

Association Pension and Welfare Funds (collectively, the "Southern Funds"), employers and management companies[1] who contribute to the Southern Funds (the "Southern Employers"), and individual employees of the Southern Employers (the "Southern Employees"), respectfully submit this brief on the merits urging this Court to affirm the judgment of the United States Court of Appeals for the Second Circuit in *Demisay v. Local 144 Nursing Home Pension Fund*, 935 F.2d 528 (2d Cir. 1991). The decision of the Second Circuit is found in the appendix to the Petition for *Certiorari* ("Pet. App.") at 1a. The decision of the United States District Court for the Southern District of New York is found in the Pet. App. at 13a.

STATEMENT OF THE CASE

A. Factual Background

Until 1981 the Southern Employers were members of Greater New York Health Care Facilities Association, Inc., a multiemployer bargaining association ("Greater New York") (JA 7, 112-13, 132-33).[2] The Southern Employers contributed to the Local 144 Nursing Home Pension Fund ("Greater Pension Fund") and the New York City Nursing Home - Local 144 Welfare Fund ("Greater Welfare Fund") (collectively, the "Greater Funds"), on behalf of their employees for whom contributions were required to be made (JA 7, 133). The majority of the Southern Employers contributed to the Greater Funds for nearly fifteen years (JA 315, 318, 335, 369, 384).

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[1] Respondent corporations have no parent companies or partially-owned subsidiary companies. Sup. Ct. R. 29.1.

[2] Citations are to the Joint Appendix ("JA") filed with this Court.

The Southern Employers withdrew from Greater New York in 1981 and became members of the Southern New York Residential Health Care Facilities Association, Inc., a nonprofit trade association (the "Southern Association") (JA 7-8, 133). The Southern Employers continued to contribute to the Greater Funds (JA 8, 133). In November 1984, following the expiration and termination of each Southern Employer's 1981 - 1984 collective bargaining agreement with Local 144, Hotel, Hospital, Nursing Home and Allied Services Employees Union, SEIU, AFL-CIO ("Local 144"), the Southern Employers executed new individual three-year collective bargaining agreements with Local 144, effective March 31, 1984 to March 31, 1987 (JA 8, 134). During negotiations leading to these agreements, the Southern Employers and Local 144 discussed the possibility of establishing new pension and welfare funds for the benefit of the Southern Employees (JA 8, 133-34).

The Southern Employers had become increasingly concerned that the Greater Funds were not administered fairly, but instead, certain employers received "special deals" and were not contributing the amounts they were obligated to contribute to the Greater Funds (JA 372-73, 377-78). The Southern Employers, who employed approximately 1,981 employees covered by the Greater Funds (JA 11), believed these special deals threatened the financial condition of the Greater Funds, consequently threatening the employees' expectations of welfare and pension benefits (JA 372-73, 377-78). The Southern Employees were approximately 20% of the employees covered by the Greater Funds.

Each of the collective bargaining agreements that the Southern Employers and Local 144 executed in November 1984 contained an identical provision that Local 144 and the Southern Employers would establish the Southern Funds (JA 8, 29). The Southern Employers negotiated on the basis that the Greater Funds would be obligated under section 302(c)(5) of the Labor Management Relations Act, 1947 ("LMRA"), 29 U.S.C. § 186(c)(5), to transfer that portion of its reserves attributable to contributions made by the Southern Employers on behalf of the

nearly 2,000 Southern Employees (JA 134). The Southern Funds became operational on December 1, 1985 (JA 11, 137).

The Greater Funds and the Southern Funds are multiemployer trust funds established and maintained pursuant to section 302(c)(5) of the LMRA ("Taft-Hartley trust funds") (JA 11, 112). At all relevant times the board of trustees of each of the Southern Funds was comprised of eight persons, four trustees designated by Local 144 as union-appointed trustees and four trustees appointed by the Southern Association as employer-appointed trustees (JA 68, 94-95). The four union-appointed trustees of the Southern Funds were at all relevant times the same individuals who acted as the four union-appointed trustees of the Greater Funds (JA 103, 106, 112).

At the time of the transfer of the Southern Employees to the Southern Funds, the Greater Funds possessed reserves that were derived, in part, from contributions received from the Southern Employers on behalf of their participant employees, and/or from the income therefrom (JA 129-131).[3] These reserves have not and will not be used by the Greater Funds to provide benefits to the Southern Employees (*id.*).

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[3] Petitioners claim, without any factual support in the record, that this "case does not raise issues regarding excess assets in benefit plans" because the Greater Welfare Fund "has been struggling to maintain health benefit levels" and the Greater Pension Fund "provides a modest maximum pension." Brief for the Petitioners ("Pet. Brief") at 4. The financial condition of the Greater Funds at the current time is irrelevant. The relevant inquiry is the financial condition of the Greater Funds at the time the Southern Employees transferred to the Southern Funds. Further, the Greater Funds' allegations about the financial condition of the Greater Welfare Fund were not raised in the district court or the court of appeals and therefore, are not properly before this Court for review. *See Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988).

The collective bargaining agreements executed by the Southern Employers and Local 144 in November 1984 provided that the Southern Funds would guarantee the Southern Employees, for the three year period ending March 31, 1987, the same level of benefits as provided by the Greater Funds as of April 1, 1984 (JA 29). When the 1984-87 collective bargaining agreements expired, the Southern Employers' obligation to provide the same level of benefits terminated (JA 270). In fact, since the expiration of the 1984-1987 collective bargaining agreements, the welfare benefits to the Southern Employees have decreased (JA 271, 284).[4]

B. The Proceedings Below

Respondents commenced this action in August 1985 against Petitioners in the United States District Court for the Southern District of New York (JA 3-4). Respondents' first cause of action alleges that the Greater Funds are structured and administered in violation of section 302(c)(5) of the LMRA for failing to transfer to the Southern Funds Respondents' aliquot share of surplus reserves attributable to contributions made by the Southern Employers for the benefit of Southern Employees (JA 11-12). Respondents' second cause of action alleges that the trustees of the Greater Funds breached their fiduciary duties under section 404(a) of the Employee Retirement Income Security Act of 1974, *as amended*, ("ERISA"), 29 U.S.C. § 1104(a), by failing to transfer the Southern Employees' share of reserves (JA 12-13). In the third cause of action Respondents allege that the Petitioner trustees violated section 4234(a) of ERISA, and breached their fiduciary duties in violation of section 404(a)(1)(A) and (D) of ERISA, by failing to promulgate asset transfer rules (JA 13-15).

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[4] The district court specifically noted that because the Greater Funds did not transfer reserves to the Southern Funds, "there has already been a restructuring of the Southern Funds benefit plan and one form of benefit was dropped after collective bargaining." Pet. App. at 18a n.7.

In April 1987 Respondents moved for partial summary judgment as to Petitioners' liability on all three causes of action on the grounds that there were no genuine issues of material fact that the Greater Funds refused to transfer Respondents' aliquot share of reserves, that the Greater Funds did not have asset transfer rules and that Petitioner trustees failed to transfer reserves and failed to adopt asset transfer rules (JA 123). Petitioners moved to dismiss the first cause of action as against all Respondents for lack of standing and jurisdiction, the second cause of action as against the Southern Employees for lack of standing, and the third cause of action as against all Respondents for lack of standing. Petitioners also cross-moved for summary judgment on all three claims.

By order dated March 15, 1989, the district court denied Respondents' motion for partial summary judgment, granted Petitioners' motion to dismiss the third cause of action for lack of standing and granted Petitioners' motion for summary judgment on the first and second causes of action (Pet. App. 29a). The district court held that because there was no change in collective bargaining representative, a transfer of reserves from the Greater Funds to the Southern Funds was not warranted under section 302(c)(5) (Pet. App. 21a). In reaching its decision, the district court concluded that a transfer would primarily benefit the Southern Employers, not the Southern Employees (Pet. App. 20a-21a), and that section 302(c)(5) was an exception to a criminal statute primarily intended to address union corruption (Pet. App. 23a).

Respondents appealed to the Court of Appeals for the Second Circuit. On June 12, 1991 a three judge panel of the Second Circuit unanimously reversed the judgment of the district court (Pet. App. 12a). The Second Circuit, rejecting Petitioners' argument that ERISA, rather than the LMRA, controlled the issue on appeal, concluded that because all of the Southern Employees transferred from the Greater Funds, the reserves in the Greater Funds, attributable in part to contributions made by the Southern Employers for the benefit of the Southern Employees, could never be used for their benefit as mandated by the statutory language of section 302(c)(5) (Pet. App. 11a). The Second Circuit rejected

Petitioners' claims that section 302(c)(5) should be interpreted to permit contributions by the Southern Employers to be used solely for the benefit of the other employees in the Greater Funds, to the exclusion of the Southern Employees (Pet. App. 9a-10a). The Court of Appeals also noted that its holding did not, contrary to Petitioners' fears, require multiemployer plans to directly match employer benefits to employer contributions (Pet. App. 10a). The Second Circuit remanded with instructions to enter partial summary judgment for Respondents and to determine the amount of excess reserves to be transferred from the Greater Funds to the Southern Funds (Pet. App. 11a-12a). The Second Circuit found it unnecessary to reach the merits of the remaining two claims (Pet. App. 12a).

Petitioners filed a petition for a writ of *certiorari* on October 10, 1991. This Court granted the petition for a writ of *certiorari* on June 22, 1992.

SUMMARY OF ARGUMENT

Congress, in section 302(c)(5) of the LMRA, expressly provided that employers may contribute to a Taft-Hartley trust fund only if, *inter alia*, those contributions are used "for the sole and exclusive benefit of the employees of such employer, and their families and dependents," or for the benefit of such employees "jointly with" the employees of other employers. The plain meaning of this provision is an employer's contributions must be used for the benefit of its employees, or for its employees together with employees of other contributing employers to the fund. An employer's contributions may not be used only for the benefit of employees of other contributing employers.

In the instant case contributions made by the Southern Employers to the Greater Funds for the benefit of the Southern Employees created surplus reserves in the Greater Funds. Because all of the Southern Employees transferred from the Greater Funds to the Southern Funds, the Greater Funds will not use their surplus

reserves, even in part, for the benefit of the Southern Employees. This structural defect in the Greater Funds must be remedied by requiring each of the Greater Funds to transfer a share of their surplus reserves to the Southern Funds.

The purpose of section 302(c)(5), and the legislative history of the LMRA, reinforce the application of the plain language of section 302(c)(5) to order a transfer under the circumstances of this case. Congress enacted section 302(c)(5) to ensure that employees are not deprived of the benefit of the contributions created by their labor. Without a transfer here, the benefit of the contributions attributable to the labor of the Southern Employees will be used solely for the benefit of other employees. A transfer of a share of the surplus reserves in the instant case furthers the congressional intent because it ensures that the Southern Employees benefit from the contributions that created the surplus reserves in the Greater Funds.

Contrary to the argument of Petitioners, the transfer ordered here does not create a broad rule allowing any employer to claim assets from a trust fund if that employer leaves the fund. The rule proposed by Respondents requires a transfer under section 302(c)(5) only when all of the employees of a contributing employer transfer from a Taft-Hartley trust fund and that trust fund has surplus reserves. A transfer here does not interfere with the pooling of assets and liabilities in multiemployer benefit plans, nor require trust funds to segregate contributions by employer. It requires only that the Greater Funds transfer a proportionate share of their pooled surplus reserves to the Southern Funds.

There is nothing in the statutory language or legislative history of ERISA that overrides or modifies section 302(c)(5)'s strict statutory requirements regulating Taft-Hartley trust funds. In fact, ERISA's provisions requiring transfers under certain circumstances indicates that Congress believes transfers can be accomplished without jeopardizing multiemployer plans. A transfer in the instant case gives effect to the plain meaning of section 302(c)(5) in a manner consistent with ERISA.

ARGUMENT

I.

SECTION 302(c)(5) OF THE LMRA COMPELS A TRANSFER OF SURPLUS RESERVES FROM THE GREATER FUNDS TO THE SOUTHERN FUNDS

The Court of Appeals correctly held that the Greater Funds violated section 302(c)(5) of the LMRA under the circumstances present in the instant case. The statutory language, purpose and legislative history of section 302(c)(5) mandates that employer contributions to a Taft-Hartley trust fund must be used for the benefit of the employer's employees, or for the benefit of the employer's employees jointly with employees of other employers contributing to the fund. In this case the Greater Funds retained surplus reserves, derived in part from contributions made on behalf of the Southern Employees by the Southern Employers, when all of the Southern Employees transferred from coverage under the Greater Pension and Welfare Funds to the Southern Pension and Welfare Funds.[5] Those contributions cannot be used by the Greater Funds for the benefit of the Southern Employees, or for the benefit of the Southern Employees together with the other employees. The transfer ordered here rests squarely on the plain meaning of section 302(c)(5) and furthers the congressional intent

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[5] The Second Circuit's holding recognizes that "when all the employees of any employer are removed from a fund, there is no chance," that any of the employees will benefit from the contributions made on their behalf unless there is a "reallocation of reserves." Pet. App. at 11a. While the Second Circuit's decision does not specifically identify those reserves as surplus, in this case Respondents seek only the Southern Employees' proportionate share of the surplus reserves in the Greater Funds. Surplus reserves are the amount of a fund's assets in excess of its liabilities.

to protect the right of employees to the benefits for which they have worked.

A. The Plain Meaning Of The Statutory Language In Section 302(c)(5) Requires A Transfer of Surplus Reserves

Section 302(a) of the LMRA generally prohibits employers from paying any money to any representative of their employees. 29 U.S.C. § 186(a). Section 302(c)(5), however, sets forth an exception to the general rule by permitting employers to contribute money to a Taft-Hartley trust fund for the payment of welfare and pension benefits to their employees if certain specific statutory requirements are met. 29 U.S.C. § 186(c)(5). The first requirement, the "sole and exclusive benefit" rule, is the basis for the Second Circuit's decision.[6] It mandates that employer contributions be used

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[6] The statute sets forth seven requirements in addition to the "sole and exclusive benefit" requirement that must be satisfied by Taft-Hartley trust funds to qualify for the section 302(c)(5) exception. The contributions and income thereon must be held in trust. The funds may be used only to pay for certain benefits enumerated in the statute, such as medical or hospital care costs, retirement pensions, compensation for injuries, life insurance and other such benefits. There must be a written agreement detailing the basis on which payments to employees will be made. The employees and the employers must be equally represented in the administration of the trust fund. The written agreement must provide that if the two groups deadlock on the administration of the fund, an impartial umpire will decide the dispute. There must be an annual audit of the trust fund, with the results available for inspection by interested persons. There must be a separate trust fund established for employer contributions intended to be used for the payment of pensions or annuities. 29 U.S.C. § 186(c)(5).

"for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents ***jointly with*** the employees of other employers making similar payments, and their families and dependents)."

29 U.S.C. § 186(c)(5) (emphasis added).

The issue before the Court turns on the meaning of the term "jointly with." In particular, the issue is whether the contributions of an employer must be used, at least in part, for the benefit of its own employees, or whether the contributions may be used solely for the benefit of "the employees of other employers."

By its plain terms the statute does not permit contributions of one employer to be used only for the benefit of the employees of other employers. The language of section 302(c)(5) limits the exception provided in that section to two, and only two, situations: when the contributions of the employer are used for the benefit of its employees (and their families and dependents); or when the contributions are used for the benefit of that group "jointly with" the employees (and families and dependents) of "other employers making similar payments." Nowhere does the statute provide an exception for use of the contributions of one employer solely for the benefit of the employees of "other employers making similar payments."

To create such an exception, the statute would need to have been written in quite different terms. A provision stating that contributions must benefit employee group A, or employee group A "jointly with" employee group B, does not contemplate that contributions benefit only employee group B. The term "jointly with" is a conjunctive term, not a disjunctive one. If Congress had wished to allow use of employer contributions only for the benefit of employee group B, it would have written the statute to state that employer A's contributions must be used to benefit employee group A *or* employee group B, or to benefit employee groups A and B jointly.

Properly read, the term "jointly with" does not mean that funds contributed by one employer to a Taft-Hartley trust fund may be used for the benefit of the employees of some other employer, without also benefiting its own employees. Rather, it simply allows trust funds to pool employer contributions for the benefit of both groups of employees together. Section 302(c)(5) does not require a Taft-Hartley trust fund to segregate an employer's contributions for use only by the employer's employees, as long as those employees are receiving the benefit of the funds as a whole. But the "sole and exclusive benefit" provision does require that the contributing employer's employees derive benefit from the contributions.

The Greater Funds admit they have reserves attributable, in part, to contributions received from the Southern Employers on behalf of the Southern Employees (JA 129-31). The Greater Funds admit these reserves are not being used to pay or provide benefits to the nearly 2,000 Southern Employees, who comprised nearly 20% of the employees covered by the Greater Funds (*id.*). The Greater Funds instead will use the surplus reserves for the benefit of employees other than the Southern Employees. Because the Southern Employees will not benefit from the surplus reserves created by contributions made on their behalf, the Greater Funds cannot satisfy the plain language in section 302(c)(5) that contributions made by the Southern Employers benefit the Southern Employees, or the Southern Employees jointly with employees of other contributing employers.

Respondents do not contend that the "jointly with" term means that the contributing employer's employees must receive a certain amount of tangible benefits. Employees benefit when they receive health insurance -- even if they do not actually use the insurance. Employees benefit when they earn pension credits -- even if they never receive a pension. Employees do not benefit from contributions, however, when those contributions are used to create surplus reserves. Only those employees who participate in

the trust fund at the time the surplus reserves are used by the fund benefit from the contributions used to create the surplus reserves.[7]

This can be seen by looking at how a pooled Taft-Hartley trust fund operates. If three employers, A, B and C, contribute to the fund on behalf of their employees pursuant to collective bargaining agreements, the trust fund pools the contributions and the income thereon, and uses them to pay benefits and administrative expenses. The amount of the trust fund's pooled assets in excess of its pooled liabilities are surplus reserves. The employees of Employers A, B and C benefit from the contributions made on their behalf through welfare and pension coverage. If some of Employer A's employees leave the fund, the employees of Employer A who remain in the fund continue to benefit from Employer A's contributions. If all of Employer A's employees transfer from this fund, however, none of Employer A's employees will benefit from the contributions made by Employer A that created the surplus reserves. Instead, the trust fund will use the surplus reserves solely for the benefit of employees of Employers B and C. Without a transfer of a share of the surplus reserves, Employer A's contributions have not been used for the benefit of Employer A's employees jointly with employees of Employers B and C.

This Court repeatedly has stated that courts should interpret a statute to give effect to the plain meaning of the statutory language. *Patterson v. Shumate*, 112 S. Ct. 2242, 2247 (1992);

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[7] Certain Southern Employees earned a vested nonforfeitable right to a pension of a fixed amount from the Greater Pension Fund. The Greater Pension Fund is obligated to pay them their pensions. These Southern Employees will not benefit, however, from the surplus reserves their labor created. The Greater Funds admitted, in response to Plaintiffs' First Request for Admission of Facts pursuant to Rule 36 of the Federal Rules of Civil Procedure, that the reserves are not being used to pay or provide benefits to the Southern Employees (JA 129-31).

INS v. Cardoza-Fonseca, 480 U.S. 421, 431-32 (1987); *United States v. James*, 478 U.S. 597, 604 (1986). Indeed, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The Second Circuit's reallocation of surplus reserves in this case gives effect to the plain meaning of "jointly with" in section 302(c)(5)'s sole and exclusive benefit provision because it ensures that the Southern Employers' contributions are used for the benefit of the Southern Employees.

B. The Second Circuit's Decision Furthers The Purpose of Section 302(c)(5)

Nothing in the legislative history of the LMRA justifies departure from the plain meaning of the statutory language. *Shumate*, 112 S. Ct. at 2248 (when text of statute is clear, plain meaning is dispositive and proponent of interpretation that is contrary to plain meaning bears an "exceptionally heavy" burden of persuasion) (*quoting Union Bank v. Wolas*, 112 S. Ct. 527, 530 (1991)); *see also James*, 478 U.S. at 606. In fact, the legislative history of the LMRA and the purpose of section 302(c)(5) reinforces the interpretation of "jointly with" proposed by Respondents.

Congress enacted section 302(c)(5) to "protect the rights of employees to benefits out of these funds which are created by their own labor." 93 Cong. Rec. 5147 (1947) (remarks of Sen. Ball), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1498 (1948) [hereinafter Leg. Hist.]. Congress recognized that "on any reasonable basis, payments by an employer to such a fund are in effect compensation to his employees." 93 Cong. Rec. 4882, *reprinted in* 2 Leg. Hist. at 1321. In fact, as Senator Taft, the sponsor of the LMRA, remarked, the money for welfare funds is "money earned by the employees," in effect, money that is "deducted from the wages of the employees." 93 Cong. Rec. 4876, *reprinted in* 2 Leg. Hist. at 1311. This Court also has recognized that

employer contributions to Taft-Hartley trust funds are "really another form of compensation to the employees." *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 469 (1960). Indeed, absent a contractual requirement to contribute to a trust fund, the Second Circuit noted, "an employer could use these same funds to pay higher wages to its employees." Pet. App. at 9a (*citing Bey v. Muldoon*, 223 F. Supp. 489, 495 (E.D. Pa. 1963) ("If an employer agreed to give five cents to a union trust fund for every hour of work by an employe [*sic*], the hourly wage paid directly to the employe [*sic*] would be five cents less"), *aff'd*, 354 F.2d 1005 (3d Cir.), *cert. denied*, 384 U.S. 987 (1966).

Congress intended the structural requirements of section 302(c)(5) to ensure that there was no diversion of trust fund monies from the employees whose labor created those funds. Without section 302(c)(5)'s statutory restrictions on trust funds, Senator Taft noted, "the employees for whose benefit it [a trust fund] is supposed to be established, for certain definite welfare purposes, will have no legal rights and will not receive the kind of benefits to which they are entitled after such deductions from their wages." 93 Cong. Rec. 4877, *reprinted in* 2 Leg. Hist. at 1312. This Court has recognized the legislative intent of section 302(c)(5) to protect employees' right to the funds they created:

> "the 'sole purpose' of § 302(c)(5) is to ensure that employee benefit trust funds 'are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them. . . .' 93 Cong. Rec. 4678 (1947). Senator Ball stated that 'all we seek to do by [§ 302(c)(5)] is to make sure that the employees whose labor builds this fund and are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled.'" (citations omitted.)

NLRB v. Amax Coal Co., 453 U.S. 322, 331 (1980).

Congress did not intend section 302(c)(5) simply to allow employers to build a surplus reserve of funds. The contributions represent monies that would otherwise have been paid to employees in the form of wages. To be lawful under section 302(c)(5), employer contributions must be used for their intended purpose -- to benefit, in the form of pension and welfare benefits, the employer's employees. 29 U.S.C. § 186(c)(5).

A transfer of a proportionate share of surplus reserves from each of the Greater Funds to the Southern Funds advances section 302(c)(5)'s purpose by ensuring that the Southern Employees benefit from the funds created by their labor. Without a transfer of a share of surplus reserves in this case, the contributions and surplus reserves created by the Southern Employees' labor will not be used for their benefit. The Southern Employees, who gave up higher wages for years so their employers would contribute to the Greater Funds, are entitled to benefit from the surplus reserves created by the contributions.

The transfer ordered here also furthers the broader congressional intent of the LMRA to protect the rights of employees in their relations with employers and labor unions. 29 U.S.C. 141(b). If this Court does not affirm the Second Circuit's decision, the Southern Employees will lose the benefit of their labor solely because they exercised their rights under the National Labor Relations Act, *as amended*, and agreed with the Southern Employers in collective bargaining to transfer from the Greater Funds to the Southern Funds.

II.

A TRANSFER UNDER CIRCUMSTANCES PRESENT HERE CREATES A WORKABLE RULE THAT ACHIEVES THE GOAL OF SECTION 302(c)(5) AND DOES NOT UNDERMINE THE OPERATION OF MULTIEMPLOYER PLANS

Petitioners raise several arguments to circumvent the application of the "jointly with" language of section 302(c)(5). Because Petitioners cannot identify any clearly expressed legislative intention contrary to the plain meaning of section 302(c)(5), they argue instead that the legislative history does not support the proposition that Congress intended "to confer on the federal courts authority to oversee the administration of employee benefit plans." Pet. Brief at 8. Both Petitioners and the Solicitor General of the United States, as *amicus curiae* ("Solicitor General"), categorize section 302(c)(5) as only a criminal statute not intended to set standards for Taft-Hartley trust funds. Pet. Brief p. 9; Solieitor Gen. Brief p. 14. Petitioners and the Solicitor General also argue that this Court should ignore the statutory language and purpose of section 302 of the LMRA because the transfer ordered here is difficult to effect and would interfere with the operation of multiemployer plans.[8] Pet. Brief p. 24-28; Solicitor Gen. Brief p. 21-23.

A. Federal Courts Have Authority To Remedy Violations Of Section 302(c)(5) In Civil Cases

In section 302(e), Congress expressly granted authority to the "district courts of the United States" to restrain violations of section 302. 29 U.S.C. § 186(e). The plain language of the

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[8] The argument by Petitioners and the Solicitor General that ERISA, rather than the LMRA, controls the issue here is addressed *infra* in Section III, p. 28-35.

statute states that federal courts have authority to review employee benefit plans under section 302 of the LMRA. In *United Mine Workers of Am. Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573 n.12 (1982), this Court stated, "[i]t is, of course, clear that compliance with the specific standards of § 302(c)(5) in the administration of welfare funds is enforceable in federal district courts under § 302(e) of the LMRA." In *Arroyo v. United States*, 359 U.S. 419, 426-27 (1959), this Court noted that "[c]ontinuing compliance with these standards [section 302(c)(5)] in the administration of welfare funds was made explicitly enforceable in federal district courts by civil proceedings under § 302(e)."

Petitioners' claim that the Second Circuit has no authority to consider whether the Greater Funds violated section 302(c)(5) is based on an erroneous reading of this Court's decision in *Robinson*. Pet. Brief p. 19. *Robinson* involved a claim by widows of coal miners that a provision in the collective bargaining agreement distinguishing between the benefits available to widows of pensioners and widows of pension-eligible mine workers had no rational relationship to the purpose of the trust fund and therefore was unlawful under section 302(c)(5). 455 U.S. at 567-68. This Court held that federal courts do not have authority under section 302(c)(5) to review for reasonableness the provisions of a collective bargaining agreement that allocates benefits among participants of a welfare fund. *Id.* at 574

In this case, unlike *Robinson*, Respondents do not challenge the reasonableness of any collectively bargained term between the Southern Employers and Local 144, or between the employers contributing to the Greater Funds and Local 144.[9]

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[9] The mere reference in the collective bargaining agreements between Greater New York and Local 144 to the Greater Funds' trust agreements do not make the provisions of the trust agreements collectively bargained terms. Pet. Brief p. 19. The Greater Funds' trust documents provide that each may be amended at any time by written agreement of the trustees (JA 170-71, 194). This power is not controlled by the employers or

Nor do Respondents question any decision of the Greater Funds' trustees with respect to the payment of pension or welfare benefits to any participant of the Greater Funds. Respondents seek only the enforcement of section 302(c)(5)'s "sole and exclusive" benefit requirement that the Southern Employers' contributions to the Greater Funds be used for the benefit of the Southern Employees, or for the benefit of the Southern Employees jointly with the employees of the other contributing employers. The Court's affirmance of a transfer of a proportionate share of surplus reserves in the instant case does not judge the reasonableness of any provision in any collective bargaining agreement.

B. The Scope Of Section 302(c)(5) Extends Beyond Acts Of Union Corruption

Contrary to the argument of Petitioners and the Solicitor General, this Court's decisions recognize that Congress intended the structural requirements in section 302(c)(5) to do more than merely guard trust fund assets from misuse by union officials. If guarding against union misuse had been Congress' sole objective, the "sole and exclusive benefit" provision would have been drafted with greater precision specifically to provide that employer contributions could not be used for union purposes.[10] *See James*, 478 U.S. 597, 609 (1986). Instead, Congress chose to draft section 302(c)(5) broadly to ensure that contributions made to trust

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employees in collective bargaining. This Court has rejected the proposition that the administration of a Taft-Hartley trust fund is "collective bargaining" within the meaning of federal labor laws. *Amax Coal*, 453 U.S. at 337 n.12.

[10] Even assuming, *arguendo*, that in 1947 Congress was concerned primarily with combating union corruption, the "fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank*, 112 S. Ct. at 531.

funds were not diverted by anyone from the employees whose labor created the funds.[11]

This Court has never restricted the application of section 302(c)(5) to cases that involve allegations of corruption by union officers, or claims that the union is diverting trust fund assets from the participants in the plan. In *Walsh v. Schlecht*, 429 U.S. 401 (1977), for example, all members of this Court concluded that a provision of a collective bargaining agreement, requiring a general contractor to contribute to Taft-Hartley trust funds with respect to work performed by employees of a nonsignatory subcontractor, would violate section 302(c)(5) if interpreted to require contributions "on behalf of" those employees. 429 U.S. at 407. The subcontractor's employees were not eligible for benefits from the funds. *Id.* Justice White, in dissent, agreed with the majority's conclusion on this issue and noted, "the provision is illegal because the employees of the noncontributing contractor may not be a beneficiary of the trust funds, even though the contributions are made with respect to them."[12] *Id.* at 412.

There were no allegations in *Walsh* of corrupt behavior by union officials, or a danger that the union was diverting assets from participants for union purposes. 429 U.S. at 403-06. The

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[11] For example, the last structural requirement in section 302(c)(5) -- mandating the creation of a separate trust for contributions intended to provide pension benefits -- protects participants in pension plans against use of their assets to provide welfare benefits. The establishment of separate trust funds for pension benefits and welfare benefits provides no inherent protection against misuse of funds by union officers.

[12] Justice White dissented from the majority's view in *Walsh* that the provision did not violate section 302(c)(5) because it should be interpreted to require the employer to contribute funds to the welfare plan measured by the hours of work performed by the subcontractor's employees. 429 U.S. at 412.

same is true of at least two other decisions of this Court involving section 302(c)(5). *See Lewis*, 361 U.S. 459, 471 (1960) (Court rejected argument that an employer who had a judgment in its favor against the union representing its employees for violations of the collective bargaining agreement may offset that liability against the contributions the employer owes to a Taft-Hartley welfare fund under the collective bargaining agreement, in part because this would violate the "sole and exclusive benefit" provision in section 302(c)(5)); *Amax Coal*, 453 U.S. 322, 336 (1981) (Court concluded that employer trustees of a Taft-Hartley trust fund are not "representatives" for collective bargaining purposes, in part because the "atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by § 302(c)(5)," prohibits a trustee from acting in any way contrary to the interests of the beneficiaries). There is no reason this Court should now limit its reading of section 302(c)(5).

Although it is unnecessary to allege union corruption or diversion of assets for union purposes before a federal court has authority to find a violation of the statutory requirements of section 302(c)(5), the Southern Employers' desire to create new pension and welfare funds for their employees arose out of a concern that the Greater Funds were not administered fairly. The Southern Employers believed that certain employers were not making their proper contributions to the Greater Funds, potentially harming the financial condition of the Greater Funds and eventually affecting the Greater Funds' ability to provide the same level or an increased level of benefits to employees (JA 372-73, 377-78). The creation of the Southern Funds was intended to ensure that the statutory requirements of section 302(c)(5) were met and the Southern Employees received the benefit of the contributions made on their behalf.

C. Respondents Propose a Narrow Rule That Meets The Requirements of Section 302(c)(5) In A Manner Consistent With the Operation of Multiemployer Plans

Petitioners and *amici curiae* argue that section 302(c)(5) should be read to permit the Greater Funds to use all of their surplus reserves solely for the benefit of the employees remaining in the Greater Funds, to the exclusion of the Southern Employees, because a contrary decision would create a broad rule that permits an employer to take trust fund assets whenever an employer leaves a fund. This broad rule, Petitioners and the *amici curiae* claim, is inconsistent with the operation of multiemployer plans and would undermine the entire multiemployer benefit plan system.[13] These arguments are unmerited.

1. Respondents Propose A Narrow Workable Rule That Achieves The Goals of Section 302(c)(5)

The rule Respondents urge the Court to apply in the instant case does not create a broad transfer rule, but instead, recognizes that a transfer of assets from a Taft-Hartley trust fund is necessary to satisfy the statutory language of section 302(c)(5) only in limited factual circumstances. A transfer is required only when: (1) all of the employees of the contributing employer transfer from the fund; and (2) the transferor fund has surplus reserves. If both

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[13] The National Coordinating Committee for Multiemployer Plans; the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds; and the Western Conference of Teamsters Pension Trust Fund submitted briefs as *amicus curiae* also arguing that the Second Circuit's decision undermines the operation of multiemployer plans because it prohibits the pooling of assets and liabilities in multiemployer plans and permits an employer to take assets whenever it chooses to leave a plan. As demonstrated herein, these arguments are unmerited.

factors are present, a transfer of a share of reserves from the transferor trust fund is necessary because the transferor trust fund holds contributions that are not being used, as required by section 302(c)(5), for the benefit of the transferred employees.

As explained in the example on page 13, *supra*, under the rule proposed by Respondents, a transfer is not required under section 302(c)(5) if only some of the employees of an employer leave a Taft-Hartley trust fund.[14] Because some of the contributing employer's employees remain in the fund, the trust fund can use its contributions to benefit those employees jointly with employees of other contributing employers. There would be no violation of section 302(c)(5)'s strict statutory requirements under these circumstances.[15]

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[14] For example, in *O'Hare v. General Marine Transp. Corp.*, 740 F.2d 160, 173 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985), the Second Circuit did not order a transfer of reserves when only a few employees left a pension fund. *O'Hare* involved a claim by an employer that section 302(c)(5) mandated a return of contributions it made to a pension fund on behalf of group of employees who voluntarily left its employ and joined a different union and pension plan. The Second Circuit rejected the employer's argument, noting that, because only a few employees left the pension fund and many of the employer's employees remained in the pension fund, the employees would share jointly with other employees in the benefits of the pension fund as required by section 302(c)(5). *Id.* at 173.

[15] The trustees of the trust fund would not, however, have the unfettered right to deny a transfer under these circumstances. The trustees' decision would be subject to their fiduciary obligations to the transferor fund's participants who withdraw from the trust fund. Those fiduciary duties may arise under section 302(c)(5) or under ERISA. *See Amax Coal*, 453 U.S. at 332. In *Robinson*, this Court left open the question of "whether federal courts sitting as courts of equity are authorized to

It also would not be necessary to transfer reserves under section 302(c)(5) when there are no surplus reserves in the trust fund. In that situation all of the employer contributions to the Taft-Hartley trust fund would have been used already for the employees participating in the fund. For example, if the Southern Employees transferred from the Greater Funds to the Southern Funds when there was a deficit in the Greater Funds, or when the assets in the Greater Funds exactly matched the benefits owed to participants and beneficiaries, all of the monies paid into the Greater Funds by contributing employers would have been used for the benefit of the Southern Employees, jointly with the employees of the other contributing employers. Because there are surplus reserves in the Greater Funds, however, the Greater Funds hold assets, attributable in part to contributions made on behalf of the Southern Employees, that will not be used in any way for the benefit of the Southern Employees.

The Solicitor General recommends that a court should judge the refusal of the Greater Funds' trustees to transfer reserves in this case under ERISA's fiduciary duty standard. Solicitor Gen. Brief p. 23. A discretionary standard does not ensure compliance with section 302(c)(5). In addition, as a practical matter, when all of an employer's employees have transferred from a fund, the trustees of the transferor fund may have difficulty balancing the interests of the employees remaining in their fund with the interests of the transferred employees in determining whether to transfer assets. *See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 173 (1971) (Court noted that there was a risk the union "would be bound to balance" the interests of active employees in the bargaining unit with the interests of retired employees in a way that favored the interests of the active employees). Indeed, there is nothing in the record to indicate that the trustees of the Greater Funds gave any consideration to transferring excess reserves to the Southern Funds when all of the Southern Employees transferred (JA 113, 115).

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enforce" the "traditional fiduciary duties" imposed on trustees by section 302(c)(5). 455 U.S. at 573 n.12.

2. The Rule Respondents Propose Does Not Interfere With The Operation Of Multiemployer Plans

A transfer of surplus reserves from one multiemployer plan to another is neither a novel occurrence nor a threat to the operation of multiemployer plans. In ERISA, for example, Congress provided that transfers from one multiemployer benefit fund to another may be necessary in three situations: (1) when plan trustees have a fiduciary obligation to transfer; (2) when employees change collective bargaining representatives and such change causes the employees to be covered by another pension fund; and (3) when a pension fund's asset transfer rules require a transfer. 29 U.S.C. §§ 1104, 1415, 1414.[16] When it enacted the foregoing provisions, Congress obviously believed that transfers between multiemployer benefit plans could be accomplished without impeding the operation of multiemployer plans.

Contrary to Petitioners' argument, a transfer in the circumstances presented here does not require multiemployer plans to segregate contributions by each contributing employer, or directly match contributions and payment of benefits to employees. Under the rule proposed by Respondents, a multiemployer benefit plan must simply determine, in the event all the employees of a contributing employer leave the fund, whether the transferor fund has surplus reserves at that time. This determination is made on a pooled; not an individual, basis.

As a remedy in this case, the district court may calculate the amount to be transferred from the Greater Funds to the Southern Funds based on each of the Greater Funds' pooled performance. For example, the Southern Welfare Fund would be

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[16] As discussed herein, the situations set forth in ERISA are not intended to be exclusive. Rather, Congress intended both the LMRA and ERISA to apply to Taft-Hartley trust funds. *See* pages 28 29, *infra*.

entitled to the average ratio of the Southern Employers' contributions to the total contributions to the Greater Welfare Fund as a percentage of the increase in the Greater Welfare Fund's surplus reserves during the time the Southern Employers contributed to the Greater Welfare Fund. *See Local 50, Bakery & Confectionary Workers v. Local 3, Bakery & Confectionary Workers*, 733 F.2d 229, 238 (2d Cir. 1984). The amount would be increased by an appropriate interest factor to reflect the fact that the Southern Funds were entitled to the transfer when the Southern Employees withdrew from the Greater Funds.

Petitioners and the *amici curiae* argue that this Court should not give effect to the plain meaning of section 302(c)(5) because a transfer of reserves will result in plan failures and cause a significant number of employers to withdraw from multiemployer plans. As discussed at pages 22-23, *supra*, transfers would occur only when the transferor fund has surplus reserves at the time all of the employees of a contributing employer leave the fund. Section 302(c)(5)'s requirements would require only a portion of the surplus to be transferred from one trust fund to another trust fund. Transfers under these circumstances will not cause multiemployer funds to fail because the transferor fund would retain the share of its surplus reserves it is not required to transfer.

The Court's affirmance of the transfer ordered here will not encourage significant employer withdrawals from multiemployer plans. Employers cannot unilaterally cease to contribute to a Taft-Hartley trust fund and cause a transfer of funds. An employer may transfer from one fund to another only if it has agreed with the collective bargaining representative of its employees to transfer from the fund, or if it has the right to do so pursuant to the National Labor Relations Act.[17]

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[17] An employer may transfer from a fund under the National Labor Relations Act only if their employees decertify their collective bargaining representative, or if the employer bargains to impasse with the union concerning transfer. 29 U.S.C. § 159(c); *NLRB* v. *Katz*, 369 U.S. 736, 745 (1962).

Since the Second Circuit's 1984 decision in *Local 50*, 733 F.2d 229, which recognized the necessity, under certain circumstances, to transfer reserves under section 302(c)(5), only three decisions, other than the instant case, have addressed the issue of interfund transfers under section 302(c)(5). In each of these cases the claim arose from disputes between labor unions over the disposition of trust fund reserves -- not as a result of a withdrawal by an employer from a multiemployer plan.[18] None of these cases involved the termination of any multiemployer benefit plan. In fact, as in the instant case, plaintiffs in all of the cases sought a transfer of reserves from one multiemployer fund to another multiemployer fund. *See Sheet Metal Workers' Local 28 of New Jersey Welfare Fund v. Gallagher*, 960 F.2d 1196, 1199 (3d Cir. 1992) (certain local unions affiliated with the international union sought a transfer of reserves from pension and welfare funds maintained by an independent local after a group of employees transferred coverage); *Stinson v. Ironworkers Dist. Council of S. Ohio and Vicinity Benefit Trust*, 869 F.2d 1014, 1019 (7th Cir. 1989) (union local that withdrew from a trust fund sought a transfer of reserves to a new multiemployer welfare plan it had established after the withdrawal); *Operative Plasterers and Cement Masons Int'l Ass'n Local 202 v. Board of Trustees of the Plastering Indus. Welfare and Pension Trust Funds*, 710 F. Supp. 42, 46 (E.D.N.Y.) (local union sought a transfer of pension and welfare benefit reserves contributed to another local union on behalf of its employees), *appeal dismissed*, 888 F.2d 1376 (2d Cir. 1989). *Local 50* and its progeny indicate that this Court's adoption of Respondents' rule will not cause a significant number of employer withdrawals from multiemployer plans.

[18] The Second Circuit's decision in *O'Hare* involved a claim for a return of contributions, not a claim for a transfer by an employer who withdrew from a fund. 740 F.2d at 166.

III.

A TRANSFER OF RESERVES UNDER SECTION 302(c)(5) IS CONSISTENT WITH ERISA

Petitioners and the Solicitor General argue that detailed provisions in ERISA concerning transfers of assets and liabilities between multiemployer pension plans implicitly repealed or in some way limited the statutory requirements of section 302(c)(5). Pet. Brief p. 20-22; Solicitor Gen. Brief p. 16-21. Petitioners also attempt to create a conflict between ERISA and the LMRA by arguing that a transfer of reserves under section 302(c)(5) violates or undermines ERISA.

A. ERISA Does Not Nullify Or Limit The Application Of Section 302(c)(5) Of The LMRA

There is nothing in the statutory language or in the legislative history of ERISA, or in the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") which amended ERISA, to support Petitioners' proposition that Congress intended to limit the statutory requirements of section 302(c)(5) of the LMRA. Congressional intent to repeal the language of a statute "must be clear and manifest." *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)); *see also United States v. Fausto*, 484 U.S. 439, 453 (1988) ("a later statute will not be held to have implicitly repealed an earlier one unless there is clear repugnancy between the two. . . .").

Congress intended both ERISA and the LMRA to govern Taft-Hartley trust funds. The Senate Committee reporting on ERISA stated expressly that the LMRA would continue to apply to employee benefit plans. "[T]here are essentially three federal statutes which, although accomplishing different purposes and vested within different federal departments for enforcement, are all compatible in their regulatory responsibilities." S. Rep. No. 127, 93d Cong., 1st Sess. 4 (1973), *reprinted in* Legislative History of

the Employee Retirement Income Security Act of 1974, at 590 (1976). One of these federal statutes is the LMRA, which, as noted in the legislative history of ERISA, "provides the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union." *Id.*

In the face of congressional intent that the LMRA continue to govern trust funds, Petitioners and the Solicitor General point to the detailed provisions in Title IV of ERISA concerning transfers between pension plans to argue that Congress implicitly repealed the specific statutory requirements in LMRA section 302(c)(5). This argument is illogical, not supported by any statutory language or case law, and contrary to decisions by this Court.

Petitioners' argument is illogical because the provisions in Title IV of ERISA addressing transfers between multiemployer benefit plans apply only to pension plans. 29 U.S.C. § 1321. These provisions do not apply to welfare plans. The provisions do not contain any language repealing section 302(c)(5)'s requirements. Petitioners' argument, therefore, is that because ERISA has provisions dealing with transfers among pension plans, it overrides the application of section 302(c)(5) to both welfare and pension plans.

Petitioners' and the Solicitor General's argument is based on a misplaced reliance on the proposition that courts should not interpret an earlier statute broadly to circumvent the detailed remedial scheme found in a later statute. Pet. Brief p. 22; Solicitor Gen. Brief p. 20-21. Petitioners and the Solicitor General cite to this Court's reasoning in *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979), in support of their proposition. The reasoning in *Daniel* in inapplicable to the case at bar.

Daniel involved a claim by an employee that a pension fund's alleged failure to advise him that he must have twenty years of continuous service to be eligible for pension benefits violated

the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 (the "Securities Acts"). 439 U.S. at 555. This Court dismissed the employee's claim, noting that the Securities Acts did not contain any statutory language including pension plans as securities, nor any legislative history indicating that Congress ever intended to subject pension plans to federal regulation as securities. 439 U.S. at 558, 563.

Unlike the Securities Acts in *Daniel*, Congress enacted section 302 specifically to regulate Taft-Hartley trust funds. Section 302(c)(5) establishes certain statutory requirements that must be met to permit employer contributions to Taft-Hartley trust funds. 29 U.S.C. § 186(c)(5); *see supra* p. 6. Section 302(e) expressly authorizes federal courts to restrain violations of these requirements. 29 U.S.C. § 186(e).

By asking this Court to ignore the plain language of section 302(c)(5) concerning Taft-Hartley trust funds in favor of ERISA's provisions dealing with transfers among pension plans, Petitioners and the Solicitor General essentially seek to have this Court decide which is the "better" statute.[19] When statutes overlap, courts "are not at liberty 'to infer any positive preference for one over the other.'" *Patterson v. McLean Credit Union,* 491 U.S. 164, 181 (1989) (citation omitted). This Court consistently has stated that when two statutes are "'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34 (1974) (*quoting Morton*, 417 U.S. at 551); *see also United States v. Fausto*, 484 U.S. 439, 461 n.9 (Stevens, J. dissenting). This Court has recognized that the LMRA and ERISA are capable of co-existence.

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[19] The Solicitor General, in fact, argues that ERISA is the better statute in this case to protect the Southern Employees because ERISA's general fiduciary duty "will allow trustees to make decisions that take into account the interests of *all* participants in the plan, whether they have departed or remained." Solicitor Gen. Brief p. 10-11 (emphasis in original).

See Amax Coal, 453 U.S. at 332, 334 & n.17 (Court noted that Congress intended both section 302(c)(5) and ERISA to impose fiduciary obligations on plan trustees, which responsibilities Congress "reaffirmed" with respect to multiemployer pension plans when it enacted MPPAA). The rule proposed by Respondents gives effect to the "sole and exclusive benefit" requirement of section 302(c)(5) in a manner consistent with ERISA's rules governing transfers between multiemployer pension plans.

B. The Second Circuit's Decision Does Not Violate Or Undermine ERISA

1. The Transfer Under Section 302(c)(5) Is Consistent With ERISA's Asset Transfer Rules

There is nothing in ERISA that prohibits Taft-Hartley trust funds from transferring assets between funds in situations when, as in the instant case, a transfer is necessary to remedy a violation of section 302(c)(5). Congress did not provide any specific guidelines in ERISA addressing the transfer of assets or liabilities between welfare plans. The rule proposed by Respondents does not conflict, even arguably, with any language or congressional intent in ERISA concerning transfers between welfare plans.

With respect to pension plans, Congress enacted several provisions as part of MPPAA that apply to mergers and transfers between multiemployer pension plans. 29 U.S.C. §§ 1411, 1414, 1415. Petitioners claim that these provisions permit a transfer between multiemployer pension plans only if both assets and liabilities are transferred, or only when there is a certified change in collective bargaining representative. Pet. Brief p. 29-31.

ERISA does not prohibit the transfer of assets without the transfer of liabilities. In sections 4231(b) and 4231(c) of ERISA, Congress expressly provides for the transfer of assets *or* liabilities

between multiemployer pension plans.[20] Thus, a transfer of surplus reserves among welfare and pension plans under section 302(c)(5) of the LMRA does not conflict with any provision in ERISA dealing with pension plans. Even assuming, *arguendo*, that there was a rule in ERISA mandating that assets may be transferred between pension plans only when liabilities are transferred, the transfer in the instant case would not conflict with such a rule because it involves only the transfer of surplus assets not tied to any liabilities.

Congress did not state anywhere in ERISA that a transfer between multiemployer pension plans may occur only if employees change their collective bargaining representative. Such a limitation cannot be read into ERISA's provisions on transfers between pension plans. In fact, ERISA's fiduciary standards require plan trustees to transfer assets and/or liabilities when such transfer would be in the best interests of the plan's participants. *See* 29 U.S.C. § 1104(a). *See also Vornado, Inc. v. Trustees of The Retail Store Employees' Union Local 1262*, 829 F.2d 416 (3d Cir. 1987); Solicitor Gen. Brief p. 24.

2. A Transfer Of Reserves Is Not A Benefit To The Southern Employers

Petitioners claim that the Second Circuit's decision violates ERISA and the Internal Revenue Code because it is "a transfer of

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[20] Transfers of assets or liabilities are permitted under section 4231(b) if (1) the plan sponsor notifies the Pension Benefit Guaranty Corporation of the planned transfer 120 days before the effective date; (2) the participants' or beneficiaries' accrued benefits are not lower immediately after the transfer; (3) the benefits are not subject to suspension; and (4) an actuarial valuation of the assets and liabilities of the affected plans have been performed within the year prior to the transfer. In this case the district court on remand may require compliance with these requirements before a transfer of reserves is effected.

assets for the benefit of the Southern Employers." Pet. Brief p. 32. Petitioners base this claim on the argument that, because the Southern Employers agreed to provide the same level of benefits to the Southern Employees, a transfer is not necessary to benefit the Southern Employees but will merely reduce the Southern Employers' obligation to contribute to the Southern Funds.

Petitioners' argument misses the mark. The Southern Employers agreed to provide the same level of benefits to the Southern Employees only for three years (JA 29). Upon the expiration of the 1984-87 collective bargaining agreements, the Southern Employers and Local 144 negotiated new agreements (JA 29). The district court found that under the new agreements, there was a restructuring of the Southern Funds and a decrease in welfare benefits to the Southern Employees (Pet. App. at 18a n.7). Moreover, the proper focus of this case is not the level of contributions that the Southern Employers agreed to make to the Southern Funds. The issue is whether the contributions made by the Southern Employers to the Greater Funds are being used for the benefit of the Southern Employees.

The Second Circuit's decision does not order the Greater Funds to transfer any assets or return any contributions to any Southern Employer, but to transfer a share of the pooled surplus reserves from the Greater Funds to the Southern Funds. Any transferred reserves would be transferred directly from the Greater Funds to the Southern Funds, and be held in trust by the Southern Funds in accordance with section 302(c)(5). The transferred reserves would not benefit any Southern Employer directly, or allow any Southern Employer to gain temporary use of trust fund assets. *See Holliday v. Xerox Corp.*, 732 F.2d 548, 550-51 (6th Cir.) (an employer's decision that has a primary purpose of benefiting employees but has the incidental effect of benefiting the employer as well does not violate ERISA prohibition against assets inuring to the benefit of an employer), *cert. denied*, 469 U.S. 917 (1984). If Petitioners' logic prevailed on this issue, any act that improves the financial condition of a Taft-Hartley trust fund would violate the proscription in ERISA against assets inuring to the benefit of employers. This would include the Greater Funds'

retention of the Southern Employees' share of the surplus reserves because it improves the financial condition of the Greater Funds.

Petitioners rely on two private letters rulings issued by the Internal Revenue Service ("IRS") to support their argument that the transfer of surplus reserves under section 302(c)(5) in this case is a transfer for the benefit of the Southern Employers in violation of the Internal Revenue Code. Both IRS rulings address situations involving a reversion of assets to contributing employers upon the termination of a defined benefit plan.[21] Because the Greater Funds are not terminating and no assets are reverting to the Southern Employers, these IRS rulings are inapposite.

The transfer of reserves here also is not a "return" of any contribution previously made by a Southern Employer to the

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[21] In one ruling, the IRS considered whether the excess assets of a terminated defined benefit plan, which may revert to the employers, constitute taxable income if the assets were transferred immediately to a defined contribution plan. Priv. Ltr. Rul. 89-48-032 (Sept. 6, 1989). The IRS determined that because the excess assets would be taxable if reverted to the employers, the excess assets also are taxable if a defined benefit plan was terminated and assets transferred to a defined contribution plan. The basis for the IRS' decision is that for tax purposes, upon termination of a defined benefit plan excess assets revert to the employer and then are contributed to a defined contribution plan. In the second IRS ruling cited by Petitioners, the IRS determined that an employer, which sponsored a defined benefit plan that it intended to terminate, could not use a distribution of the plan assets to satisfy its contractual obligations to a government agency arising in connection with its manufacturing and sale activity under various government contracts. Priv. Ltr. Rul. 91-36-017 (June 10, 1991). The IRS found that this would constitute, in effect, a reversion of assets to the employer because the employer would otherwise have to use its general corporate accounts to satisfy its liability.

Greater Funds. Indeed, as Petitioners admit, the Southern Employers have made no contention that they are entitled to, and the Second Circuit did not order, a return of contributions to the Southern Employers. Pet. Brief p. 33.

3. A Transfer Does Not Violate The Fiduciary Duties Of The Trustees Of The Greater Funds

Petitioners also claim that the transfer of reserves from the Greater Funds to the Southern Funds would constitute a diversion of assets to the Southern Employers and a disbursement of plan assets to the Southern Employees in violation of the trust documents of the Greater Funds. Pet. Brief p. 33. This argument is based entirely on the incorrect assumption that a transfer of a share of surplus reserves in the instant case is payment of assets from the Greater Funds directly to any Southern Employer or to any Southern Employee. The Greater Funds' trustees will not violate their fiduciary duties by transferring assets in this case.[22]

[22] In fact, the Solicitor General takes the position that ERISA's fiduciary duties impose an obligation on the Greater Funds' trustees to consider a transfer of reserves in this case. Solicitor Gen. Brief p. 23. Such fiduciary duties, the Solicitor General argues, "limit the discretion of plan trustees to refuse to transfer assets when a group of participating employers and their employees break off to form a new plan." Solicitor Gen. Brief p. 23. Further, Petitioners do not dispute the fact that they would be required to transfer assets in cases in which employees transfer to a new fund because of a change in their collective bargaining representative. Pet. Brief p. 31.

CONCLUSION

Based on the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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